

C A M P A I G N F O R ACCOUNTABILITY

November 8, 2017

By email: FOIARequest@hhs.gov

Michael Marquis
Freedom of Information Officer
Department of Health and Human Services
Hubert H. Humphrey Building, Room 729H
200 Independence Avenue, SW
Washington, DC 20201

Re: Freedom of Information Request

Dear Mr. Marquis:

Campaign for Accountability (“CfA”) makes this request for records pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552, et seq., and Department of Health and Human Services (“HHS”) implementing regulations, 45 C.F.R. Part 5.

Specifically, CfA requests that HHS produce the following within 20 business days:

1. All communications, meeting notices, meeting agendas, informational materials, draft legislation, talking points, or other materials received by HHS from, sent by HHS to, or exchanged between HHS and representatives of Alliance Defending Freedom, the Heritage Foundation, the Susan B. Anthony List, and Concerned Women for America about the May 4 “Promoting Free Speech and Religious Liberty” executive order, the HHS rules that are being drafted in response to that order, or any other efforts to alter or weaken the Affordable Care Act’s contraceptive mandate.
2. All calendar entries reflecting meetings between HHS and representatives of Alliance Defending Freedom, the Heritage Foundation, the Susan B. Anthony List, and Concerned Women for America about the May 4 “Promoting Free Speech and Religious Liberty” executive order, the HHS rules that are being drafted in response to that order, or any other efforts to alter or weaken the Affordable Care Act’s contraceptive mandate.

Please provide all responsive records from January 20, 2017 to the date the search is conducted.

By way of background, on May 4, 2017, President Trump signed the “Presidential Executive Order Promoting Free Speech and Religious Liberty,” which directed the Secretary of HHS to “consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under” the Affordable Care Act

(“ACA”).¹ The ACA’s preventive-care mandate requires employer-provided health insurance plans to cover a range of no-cost preventive health services, such as cholesterol screenings and influenza immunizations.² When the ACA was signed, one service in particular – contraception – immediately became the subject of significant controversy and protracted policy and legal battles. Some employers claimed a religious objection to the provision of birth control to their employees. At first, objecting employers worked with the Obama administration to find a compromise that would accommodate women’s needs while respecting religious liberty.³ When a compromise failed, objecting employers went to court, and cases are still pending in numerous courts of appeals.⁴ The birth control mandate also became a major political issue, and continued to be an issue during the 2016 presidential campaign.⁵ It is therefore unsurprising that with a new party in the White House came a new attempt to dismantle the birth control mandate. Following the signing of the executive order in May, HHS quickly began drafting rules that could be released at any time and that would weaken the birth control mandate by exempting significantly more employers from it.⁶

Alliance Defending Freedom, the Heritage Foundation, the Susan B. Anthony List, and Concerned Women for America, the organizations whose communications with HHS are the subject of this request, have been central to the ongoing opposition to the birth control mandate and to the legal and political attempts to invalidate it. Alliance Defending Freedom represented plaintiffs in a number of the legal challenges to the mandate, including both sets of cases to reach the Supreme Court.⁷ The Susan B. Anthony List and Concerned Women for America filed

¹ Exec. Order No. 13,798, 82 Fed. Reg. 21, 675 (May 4, 2017), *available at* <https://www.federalregister.gov/documents/2017/05/09/2017-09574/promoting-free-speech-and-religious-liberty>.

² National Conference of State Legislatures, *Preventive Services Covered Under the Affordable Care Act* (2014), <http://www.ncsl.org/research/health/american-health-benefit-exchanges-b.aspx>.

³ Helene Cooper and Laurie Goodstein, *Rule Shift on Birth Control Is Concession to Obama Allies*, *New York Times*, Feb. 10, 2012, *available at* <http://www.nytimes.com/2012/02/11/health/policy/obama-to-offer-accommodation-on-birth-control-rule-officials-say.html>.

⁴ John Solomon, *Groups: Justice court filings defy Trump promises on religious freedom*, *The Hill*, Aug. 23, 2017, *available at* <http://thehill.com/homenews/administration/347728-groups-justice-court-filings-defy-trump-promises-on-religious-freedom>.

⁵ Miriam Berg, *Planned Parenthood Action Fund, What’s at Stake for Access to Affordable Birth Control in the 2016 Election?* (2016), <https://www.plannedparenthoodaction.org/blog/whats-stake-access-affordable-birth-control-2016-election>.

⁶ Alice Ollstein, *Legal Battle Brewing As Trump’s HHS Prepares To Ax Free Birth Control Rule*, *Talking Points Memo*, Aug. 21, 2017, *available at* <http://talkingpointsmemo.com/dc/trump-birth-control-rule-hhs>.

⁷ Brief for Petitioners in Nos. 15-35, 15-105, 15-119, & 15-191, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), *available at* <http://www.scotusblog.com/wp-content/uploads/2016/01/Little-Sisters-Merits-Brief.pdf>; Brief for Petitioners, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), *available at* <http://www.adfmedia.org/files/ConestogaMeritsBrief.pdf>.

amicus briefs in both cases.⁸ The Heritage Foundation has published prolifically on the subject.⁹ The public deserves the opportunity to determine whether and to what extent these organizations have attempted to influence the administration and HHS as the executive order and promulgating rules were being drafted. The requested records would give the public that opportunity.

In addition to the records requested above, please provide records reflecting the processing of this request, including any tracking sheets; records sufficient to identify search terms used, and locations and custodians searched. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

CfA seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms “record,” “document,” and “information” in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

Please search all records regarding agency business. Please do not exclude searches of files or emails in the personal custody of agency officials, such as personal email accounts. Records of official business conducted using unofficial systems or stored outside of official files is subject to

⁸ Brief of Amici Curiae Women’s Public Policy Groups and a Coalition of Female State Legislative and Executive Branch Officials in Support of Nongovernment Parties, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/CWA-HobbyLobby-Conestoga-Amicus.pdf>; Brief Amicus Curiae of Concerned Women for America, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), available at <http://www.scotusblog.com/wp-content/uploads/2016/01/Concerned-Women-for-America-LSP-Amicus-Brief.pdf>; Brief for Amicus Curiae Michael J. New, Ph.D., Associate Scholar, Charlotte Lozier Institute, in Support of Petitioners, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), available at <http://www.scotusblog.com/wp-content/uploads/2016/01/Charlotte-Lozier-Institute-LSP-Amicus.pdf>. The Charlotte Lozier Institute is the 501(c)(3) research and education institute of the Susan B. Anthony List.

⁹ John Malcolm, The Heritage Foundation, *Obama v. Religious Liberty: How Legal Challenges to the HHS Contraceptive Mandate Will Vindicate Every American’s Right to Freedom of Religion* (2012), <http://www.heritage.org/health-care-reform/report/obama-v-religious-liberty-how-legal-challenges-the-hhs-contraceptive>; Edmund Haislmaier and Thomas Messner, The Heritage Foundation, *On Contraception Mandate, the Obama Administration’s Potential Proposed “Accommodation” Fails to Protect Religious and Moral Conscience* (2012), <http://www.heritage.org/health-care-reform/report/contraception-mandate-the-obama-administrations-potential-proposed>; Elizabeth Slattery and Sarah Torre, The Heritage Foundation, *Obamacare Anti-Conscience Mandate at the Supreme Court* (2014), <http://www.heritage.org/health-care-reform/report/obamacare-anti-conscience-mandate-the-supreme-court>; Mark Schreiber and Elizabeth Fender, The Heritage Foundation, *Employee Health Care Coverage and the “War on Women”* (2015), <http://www.heritage.org/health-care-reform/report/employee-health-care-coverage-and-the-war-women>; Sarah Torre, The Heritage Foundation, *Religious Liberty at the Supreme Court: Little Sisters of the Poor Take on Obamacare Mandate* (2016), <http://www.heritage.org/religious-liberty/report/religious-liberty-the-supreme-court-little-sisters-the-poor-take-obamacare>.

the Federal Records Act and FOIA.¹⁰ It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; CfA has a right to access those files even if they have not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.¹¹

In addition, please note that in conducting a “reasonable search” as required by law, HHS must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered HHS’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.¹² Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but HHS’s archiving tools would capture that email under Capstone. Accordingly, CfA insists that HHS use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. CfA is available to work with HHS to craft appropriate search terms. However, custodian searches are still required; agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”¹³ If it is your position that any portion of the requested records is exempt from disclosure, CfA requests that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”¹⁴ Moreover, the *Vaughn* index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of

¹⁰ See *Competitive Enterprise Institute v. Office of Science & Tech. Policy*, 827 F.3d 145, 149–150 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–956 (D.C. Cir. 2016).

¹¹ See *Competitive Enterprise Institute v. Office of Science & Tech. Policy*, ___, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

¹² Presidential Memorandum – Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), *available at* <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), *available at* <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

¹³ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

¹⁴ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

disclosing the sought-after information.”¹⁵ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”¹⁶

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹⁷ Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, CfA welcomes an opportunity to discuss its request with HHS before you undertake your search or incur search or duplication costs. By working together at the outset, CfA and HHS can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format via email at koconnor@campaignforaccountability.org. Alternatively, our mailing address is Campaign for Accountability, 611 Pennsylvania Avenue SE, #337, Washington DC 20003. If it will accelerate the release, please also provide responsive material on rolling basis.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 45 C.F.R. § 5.54, CfA requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute significantly to a better understanding of relevant government procedures by the general public. Moreover, the request is primarily and fundamentally for non-commercial purposes. 5 U.S.C. § 552(a)(4)(A)(iii).¹⁸

CfA requests a waiver of fees because disclosure of the requested information is in the public interest because it is “likely to contribute significantly to public understanding of the operations or activities of the government.”¹⁹ The disclosure of the information sought under this request will document and reveal the operations of the federal government, including how officials conduct the public’s business.

¹⁵ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223—24 (D.C. Cir. 1987) (emphasis in original).

¹⁶ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹⁷ *Mead Data Central*, 566 F.2d at 261.

¹⁸ *See, e.g., McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

¹⁹ 45 C.F.R. § 5.54(a).

As noted above, Alliance Defending Freedom, the Heritage Foundation, the Susan B. Anthony List, and Concerned Women for America have been actively involved in the legal and political challenges to the ACA's birth control mandate. Meanwhile, studies have shown that contraceptive use has numerous tangible benefits for women and families, and that cost can be an insurmountable barrier to regular contraceptive use. As the ACA went into effect between fall 2012 and spring 2014, the proportion of privately insured women who paid nothing out of pocket for the pill increased from 15% to 67%, with similar changes for other contraceptives.²⁰ In other words, the birth control mandate is working to assist women and families in obtaining the birth control they need. Against this backdrop, the public deserves to know who is behind the recent efforts to weaken the mandate. The requested documents will help the public to determine whether the executive order and HHS rules are a result of pressure from the above-listed organizations.

This request is primarily and fundamentally for non-commercial purposes. As a 501(c)(3) organization, CfA does not have a commercial purpose and the release of the information requested is not in CfA's financial interest. CfA is committed to protecting the public's right to be aware of the activities of government officials and to ensuring the integrity of those officials. CfA uses a combination of research, litigation, and advocacy to advance its mission. CfA will analyze the information responsive to this request, and will share its analysis with the public, either through memoranda, reports, or press releases. In addition, CfA will disseminate any documents it acquires from this request to the public through its website, www.campaignforaccountability.org.

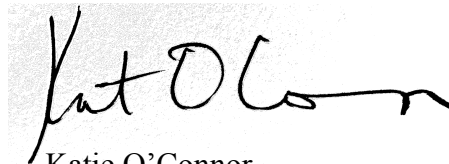
Accordingly, CfA qualifies for a fee waiver.

Conclusion

CfA looks forward to working with HHS on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact me at 202-780-5750. Further, if CfA's request for a fee waiver is not granted in full, please contact me immediately upon making such a determination.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Katie O'Connor", is written over a light gray rectangular background.

Katie O'Connor
Legal Counsel

²⁰ Adam Sonfield, Guttmacher Institute, What Is at Stake with the Federal Contraceptive Coverage Guarantee? (2017), <https://www.guttmacher.org/gpr/2017/01/what-stake-federal-contraceptive-coverage-guarantee>.